U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

Public Copy

FILE: [redacted] Office: Denver Date: APR 19 2000

IN RE: Applicant: [redacted]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under § 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(9)(A)(iii)

IN BEHALF OF APPLICANT:

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

[redacted]

DISCUSSION: The application was denied by the Acting District Director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico who pleaded guilty on February 13, 1995 to the offense of possessing a false identification document with the intent that such document be used to defraud the United States in violation of 18 U.S.C. 1028(a)(4). The applicant was placed on probation for three years without supervision, fined and ordered not to enter the United States illegally or to be found in the United States while not in possession of documents permitting him to enter or to be in the United States during that three-years period. On February 27, 1995, the applicant was found to be excludable under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(6)()C)(i), for having attempted to procure admission into the United States by fraud or willful misrepresentation. The applicant was excluded and deported on February 27, 1995. He reentered the United States illegally in March 1996 in violation of his probation and married a United States citizen on May 3, 1996.

The acting district director denied the application after determining that the unfavorable factors outweighed the favorable ones.

On appeal, counsel states that the applicant was ordered excluded and deported and he remained outside the United States for the required one year; therefore, he does not require permission to reapply for admission.

Counsel argues that retroactive application of the new provisions is a violation of the applicant's due process rights and contrary to Supreme Court case law in its Landgraf v. USI Film Products, 511 U.S. 244 (1994), decision.

Section 212(a)(6)(B) of the Act, 8 U.S.C. 1182(a)(6)(B), was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and is now codified as § 212(a)(9)(A)(i) and (ii). According to the reasoning in Matter of Soriano, Interim Decision 3289 (BIA, A.G. 1996), the provisions of any legislation modifying the Act must normally be applied to waiver applications adjudicated on or after the enactment date of that legislation, unless other instructions are provided. IIRIRA became effective on September 30, 1996.

An appeal must be decided according to the law as it exists on the date it is before the appellate body. See Bradley v. Richmond School Board, 416 U.S. 696, 710-1 (1974). In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. Matter of

George, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

The applicant was excluded and deported in exclusion proceedings. Such an action rendered the applicant inadmissible under former § 212(a)(6)(A) of the Act, 8 U.S.C. 1182(a)(6)(A).

Former § 212(a)(6)(A) of the Act, in effect until April 1, 1997, provided for the exclusion of any alien from admission into the United States who has been excluded from admission and deported and who again seeks admission within one year of the date of such deportation, unless prior to the alien's reembarkation at a place outside the United States or attempt to be admitted from a foreign contiguous territory and the Attorney General has consented to the alien's reapplying for admission.

At the time he submitted the application on March 4, 1995, the applicant was still within the one-year time frame following his removal and he was still in Mexico, so he needed to file a Form I-212 application. Even though he was present in the United States without a lawful admission or parole on March 15, 1996 more than one year had elapsed since his exclusion and removal and prior to the effective date for the implementation of amendments to the Act by IIRIRA. Therefore, he no longer requires permission to reapply for admission. See Matter of Bunag, 13 I&N Dec. 103 (D.D. 1967). The appeal regarding the Form I-212 application will be declared moot, and the matter will be terminated.

Further, there was no requirement for an alien to prove physical absence from the United States during the one year period following an exclusion. However, the applicant is still inadmissible to the United States under § 212(a)(6)(C)(i) of the Act for having attempted to procure admission into the United States by fraud or misrepresentation.

ORDER: The appeal is sustained. The application is moot and the matter is terminated.